DOCUMENT RESUME

ED 261 467 EA 018 007

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TITLE A Plan to Reduce Arbitration and Negotiation Impasses.
INSTITUTION Washington State School Directors Association, Olympia. Management Information and Training Service.
PUB DATE 85
NOTE 14p.
AVAILABLE FROM Publication Sales, Washington State School Directors Association, 200 East Union, Olympia, WA 98501 ($4.50).
PUB TYPE Viewpoints (120)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Arbitration; *Collective Bargaining; *Conflict Resolution; Consultants; Elementary Secondary Education; Employer Employee Relationship; Grievance Procedures; *Labor Problems; Labor Relations; *Negotiation Impasses; Problem Solving

ABSTRACT

This manual presents a proposal to reduce arbitration or negotiation impasses and to accommodate conflicting interests by selecting a permanent neutral to monitor labor relations both during the term of the agreement and during contract negotiations. Part 1 describes the role of the permanent neutral during the term of the collective bargaining agreement as a mediator in the grievance procedure. In this role, the aim of the permanent neutral is to prevent the formal filing of grievances when possible, to discourage frivolous grievances, and to serve as a fact finder or advisory arbitrator when necessary. (Included is a sample provision for mediation of grievances.) Part 2 describes the role of the permanent neutral as a moderator during negotiations for a new collective bargaining agreement, and as a conciliator after the parties have reached the new agreement. In the latter role, the permanent neutral's function would be to reconcile the parties and to help them anticipate, face, and then resolve issues before they again reach the bargaining table. (TE)

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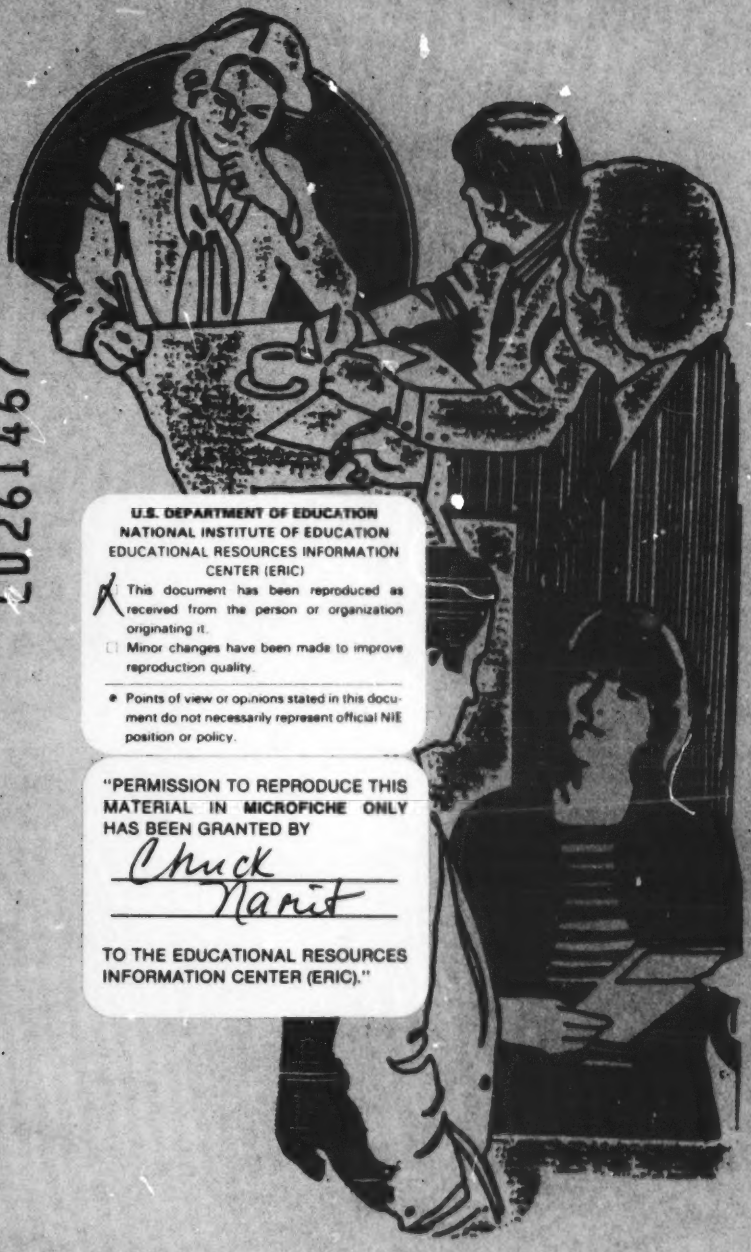

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A PLAN TO REDUCE ARBITRATION AND NEGOTIATION IMPASSES

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1985

PUBLICATION OF THE MANAGEMENT INFORMATION AND TRAINING SERVICE

Washington State School Directors' Association

EA 018 007

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INTRODUCTION

Do You Want To Reduce Arbitration and Negotiations Impasse?

If you do, consider my proposal. My proposal would not eliminate either the right to proceed to arbitration or the right to call a strike or a lockout. Arbitration is here to stay: Congress has made it national policy; the Supreme Court has given it an honored and preferred place in the judicial system; and labor and management, over forty years, have recognized it as an informal, private, speedy, and relatively inexpensive judicial process for the resolution of labor disputes. And, the parties will continue to use the strike and lockout as another weapon to achieve their goals. But arbitration, the strike and the lockout can often adversely affect the parties' continuing relationship: they do not improve, heal, reconcile, or accommodate conflicting interests. In arbitration one party wins, the other party loses; the strike and the lockout not only exacerbate hard feelings, they also sharpen conflicting views and interests.

My proposal seeks to activate and promote a continuing mode of collective bargaining that could unite parties, accommodate conflicting interests, and, if possible, foster trust and friendly relations. My proposal addresses itself to the total labor relationship: daily political struggles, unspoken, unwritten attitudes, and past practices. The proposal emphasizes continuous communication and favors the use of mediation and the logical extension of collective bargaining. The proposal seeks to delay and, possibly, prevent hasty recourse to arbitration, or a hasty declaration of impasse. The proposal also seeks to insure that parties proceed to arbitration or decide on a strike or a lockout, that they are adequately prepared for arbitration, or that they have explored all alternatives before a strike or lockout. Simply stated, the proposal favors "more consensus, less compulsion." Of course, my proposal, even if adopted, would not by itself repair or restore good labor relations without the earnest effort and determined good will of the parties.

My proposal is simple. I propose that the parties select a permanent neutral to monitor their labor relations. The permanent neutral, a trustworthy person experienced in mediation, fact-finding, and arbitration would not arbitrate. He would not serve as umpire or impartial chairperson of a tripartite board. Parties might use the permanent neutral in a variety of ways: as guide, friend, advisor, counselor, an escape valve, persuader, a conciliator, a mediator, a fact-finder, a broker of interests, midwife of change. As monitor, the permanent neutral would get to know the parties' attitudes, interests, idiosyncracies, and problems. He would be their conscience, temper partisan excesses, moderate discussions, point to permanent vital interests and temporary minor interests, suggest alternatives, identify problems, recommend changes, advocate experiments, seek acceptable political and legal changes, and work to transform, and if possible, upgrade the parties' labor relationship.

The permanent neutral would have informal and formal relations with the parties throughout the term of the collective bargaining agreement and during the negotiations for a new collective bargaining agreement. The more informal the relations between the parties and the permanent neutral, the better. Parties could call on the permanent neutral at will, anytime, for any purpose. Parties could vent their feelings, make known their frustrations, their complaints, their problems. The permanent neutral, a sounding board for new ideas, could seek to foster communication, allay suspicions, reduce animosities, suggest mechanisms for handling complaints, and conduct all sorts of meetings.

PART I: THE ROLE OF THE PERMANENT NEUTRAL DURING THE TERM OF THE COLLECTIVE BARGAINING AGREEMENT

The permanent neutral's principal function would be to prevent the formal filing of a grievance; to convince a party not to file political, frivolous or harassing grievances.

1. The Permanent Neutral in the Grievance Procedure

If one party files a formal grievance, the permanent neutral would either be physically present at every step of the grievance procedure or be privy to all communications related to the grievance. His main task during the processing of the grievance would be to make sure that the parties use, not abuse, the grievance procedure. He would seek to make sure that higher officials actually review, not simply rubber stamp, the decisions of the first level officials. He would also ensure full discovery for each party. As an active participant the permanent neutral would be aware of all the facts and he would be in an ideal position to propose alternative solutions at any step of the grievance procedure. At the final step of the grievance procedure the parties would prepare a Brief which sets forth the facts, their respective positions and arguments. They would exchange the Brief and submit it to the permanent neutral. If one party raises the arbitrability issue in its Brief, the permanent neutral would determine the arbitrability question.

2. The Permanent Neutral as Mediator of a Grievance

If the parties do not resolve the dispute in the grievance procedure the parties would proceed directly, within specified time limits, to the mediation of the grievance. Traditionally, parties have proceeded directly from

the final step of grievance procedure to arbitration. The mediation of grievances, a return to collective bargaining, can be very useful, especially in discharge and discipline cases because in these cases the remedy can be negotiated. In contract interpretation cases, it might be more difficult because neither party may want to give up a legal right. However, even a legal right can be negotiated if there is an adequate quid pro quo. Mediation of grievances can be most efficacious if contract language is ambiguous or if one party argues that past practice entitles it to a legal right.

Parties have avoided mediation of grievances because arbitration has developed into judicial arbitration, not mediation-arbitration. Parties should try mediation of grievances because mediation, not arbitration, is an extension of collective bargaining; mediation is preferable to arbitration, because the parties' own settlement is far superior to an imposed arbitral settlement. When parties proceed to arbitrate they tacitly acknowledge that collective bargaining has failed. It is relatively easy to avoid mediation, a political process, properly called the highest form of a neutral's artistry, because mediation is a difficult process; mediation compels choice and removes pretense and posturing.

Recently, representatives of a school district and of an education association and I, as the grievance mediator, resolved three grievances over the interpretation and the application of the collective bargaining agreement. We used the following experimental procedures.

From the very outset of the mediation effort, it became clear to me that the parties had entrenched themselves into a fixed, intransigent position. They did not trust or like each other, and they appeared ready to fight. The struggle for power and position was on: it was not a joint enterprise for the education of children but an arena for battle. The parties communicated rarely, and then only formally.

SAMPLE MEDIATION OF GRIEVANCES PROVISION

Notwithstanding the provisions of the Collective Bargaining Agreement, the parties hereto agree to a procedure for the mediation of grievances in accordance with the following:

A. Mediation of a grievance will be scheduled only on the basis of a joint request for mediation by the M.E.A. and the Board made within ten (10) school days after the M.E.A. has referred the grievance to arbitration, unless the parties mutually agree in writing; provided, further, that the M.E.A. has referred the grievance to arbitration in a timely fashion.

B. The mediator shall be (name).

C. One representative for each party shall present its position to the mediator, provided that the grievant shall have the right to present at the mediation conference. The Grievance Representative and Superintendent shall also have the right to attend the mediation conference.

D. The parties' representatives may, but are not required to, present the mediator with a written statement of the facts, the issues, and the arguments in support of their positions. If such a statement is not presented in written form, it shall be presented orally at the beginning of the mediation conference.

E. Proceedings before the mediator shall be informal in nature. The rules of evidence will not apply and no record of the mediation conference shall be made.

F. The mediator will have the authority to meet separately with any person or persons but will not have the authority to compel the resolution of a grievance.

G. If the grievance referred to the mediator does not involve the interpretation or application of the Collective Bargaining Agreement, the mediator shall so advise the parties and terminate the mediation proceedings.

H. If no settlement is reached during the mediation conference, the mediator shall provide the parties with an immediate oral advisory opinion which shall include the basis thereof, unless both parties agree that no such opinion be provided.

I. The mediator's opinion, if accepted by both parties, shall be reduced to writing by the mediator, but shall not constitute a precedent, unless both parties otherwise agree. Moreover, a grievance may be withdrawn or settled by the mutual consent of the parties without precedent.

J. If no settlement is reached at mediation, the Association is free to arbitrate the grievance, provided it advises the Board in writing within ten (10) school days following the mediation conference.

K. In the event a grievance which has been mediated goes to arbitration, the mediator may not serve as the arbitrator. Nothing said or done by the mediator may be referred to or introduced into evidence at the arbitration hearing and nothing said or done by either party in the mediation conference may be used against the other party in arbitration.

L. The parties agree to pay the mediator _____ per day plus expenses for each day on which he mediates. In the event that a scheduled mediation date is cancelled with less than ten (10) school days' notice, the mediator shall receive a cancellation fee of _____.

M. The fees and expenses of the mediator shall be divided equally between the Board and the Association; provided, however, that each party shall be responsible for compensating its own representatives.

This Agreement shall be for the experimental period beginning August 31, 1984, and ending August 31, 1985.

The mediation effort was successful, first, because the parties seriously looked for and ultimately found a solution, and second, because the parties were led by experienced and sophisticated representatives from the Washington Education Association and from the Washington State School Directors' Association. The mediation effort not only resolved the three grievances, it also reduced much misunderstanding, misperception, and latent hostility. Notably, the parties agreed to meet regularly at lunch each month during the school year to vent their feelings and candidly to discuss differences.

3. The Permanent Neutral as Fact-Finder

If mediation is unsuccessful, the permanent neutral would issue recommendations based on the Brief written at the last step of the grievance procedure. The written recommendation(s), delivered to the parties within seven calendar days, would serve as a basis for further negotiations and mediation. The neutral's recommendations, if accepted, would not create a precedent.

4. The Permanent Neutral as Advisory Arbitrator

If one party rejects the permanent neutral's recommendation(s), that party may ask the neutral within seven calendar days, to give the parties a written advisory arbitration opinion. The advisory arbitral opinion would have great value because it would advise one party that it probably would lose if it proceeded to arbitration. I am convinced that my summary arbitral opinion in the three disputes mentioned above caused one party to modify its position.

5. The Parties In Arbitration

If the parties proceed to arbitration, they can proceed only to expedited arbitration. There would be no formal hearing, and the parties would submit only the Brief produced at the last step of the grievance procedure to the arbitrator for a final and binding decision. Nothing said or done by the neutral or by the parties in mediation or fact-finding could be referred to or introduced as evidence at the arbitration hearing. In arbitration neither party could legally raise the question of arbitrability or discovery. This procedure would have two great advantages: the parties would be fully aware of the legal merits of their positions, and they would have prepared adequately for arbitration.

PART II: THE ROLE OF THE PERMANENT NEUTRAL IN INTEREST DISPUTES

The permanent neutral could be of great help to the parties during the negotiations for a new collective bargaining agreement, especially immediately after parties have agreed to a new collective bargaining agreement.

1. During Negotiations

During negotiations for a new agreement the parties would submit all written communications to the permanent neutral including the initial request to open negotiations and the final settlement. The neutral would sit at the bargaining table with the parties only at the request of the parties. When present, the neutral would serve as a moderating influence: their monitor. His main task would be to first keep the parties talking; then to encourage them to bargain and to settle. Specifically, he would help the parties locate and limit the scope of the bargaining to the major issues; he would try to prevent or reduce gamesmanship and delay; and he would downplay or put into perspective personality conflicts and emotional outbursts. One party could not call an impasse; and the permanent neutral could override a joint declaration of impasse only once. If the parties reach an impasse the permanent neutral would mediate the dispute. Mediation would continue until both parties agreed to ask the permanent neutral for written recommendations. After written recommendations, the permanent neutral again would seek to mediate the dispute. Within seven calendar days of the second mediation, one party could call an impasse. Five work days after the last impasse the permanent neutral would render a written summary advisory arbitration opinion.

2. After the Parties have Agreed to a New Collective Bargaining Agreement

Parties need a permanent neutral most after difficult negotiations or after a protracted strike or lockout because it is then that parties tend to ignore the issues that divide them. His main function would be to help parties anticipate, face, and then resolve issues before they again reach the bargaining table. After a brief respite, the permanent neutral could begin gently, but firmly, to bring the parties together: to heal the wounds, to remove the bitterness, suspicion, and antagonism. To reconcile the parties, and to persuade them to confront their problems, the permanent neutral could ask each party to identify present and future problems. For each problem, the parties would establish a tripartite committee with the permanent neutral as chairperson of each committee. Each committee would discuss each issue and each party would suggest a practical solution to the specific problem. Each party would discuss and comment on the solution proposed by the other party. These committees, composed of employees and the first level supervisor, would investigate irritants, complaints, grievances, cumbersome procedures, personality conflicts, unfavorable conditions -- anything that adversely affects the labor relationship. The tripartite approach would become a joint and good faith effort to prevent the filing and the festering of grievances and an honest and forthright attempt to resolve differences. This initiative would have one great advantage: the parties would have fully explored their entire relationship before negotiations for a new agreement and they would have before them practical suggestions to solve their problems before impasse.

Parties first might adopt this principle of the proposal, then experiment with and refine the procedures to implement it. This level of labor-management cooperation would not eliminate arbitration or negotiations impasse but would be conclusive proof that the parties want to improve their labor relations to avoid arbitration during the term of their collective bargaining agreement, and to avoid an impasse during negotiations for their collective bargaining agreement.